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No. 85-1273

Supreme Court, U.S.
FILED
MAR 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

ALEXANDER F. EAGLE
Petitioner,

VS.

AMERICAN TELEPHONE and TELEGRAPH COMPANY,
a Corporation,
Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondent's opposition underscores the two grounds assigned for grant of the writ by trying to avoid them, as a few words of reply will show.

1. First Ground: Plaintiff As Master of the Case He Seeks to Present

A copy of the amended complaint was attached to the petition (Appendix E) for its relevance to the *second* ground assigned for grant of the writ. Respondent unkindly says that we attached the amended complaint instead of the original complaint in order to deceive the Court with respect to the first ground.[1] It then implies

[1] It states (p. 9):

"The extremes to which petitioner goes in an attempt to hide this fact are best illustrated by his decision to include in the appendix to the petition only the *amended* complaint, which was filed after removal". [Emphasis in original.]

We therefore attach a copy of the original complaint to this reply.

that, relative to removability, there is a difference between the original and amended complaints. There is not, and neither court below based its decision about jurisdiction on any such supposed difference. The issue of removability *always* turned on *Snyder v. Harris*, 394 U.S. 332 (1969) (see opinion below, Pet. 6a). Respondent says (p. 8) that the court below found that the amount in controversy in the original complaint exceeded $10,000. But it did so only by holding aggregation proper. It was never disputed that the necessary jurisdictional amount was absent unless the claims of members of the putative class could be *aggregated*.

Thus the issue turned on whether the claim which petitioner sought to present was or was not derivative. Respondent argues (p. 12) that "[t]here is no basis for petitioner's contention that the court below treated his claim as a derivative action rather than an individual claim for breach of fiduciary duty". On the contrary, the opinion of that court states (Pet. 7a): "The majority shareholder's duty must be enforced either directly by the corporation or through a shareholders' derivative suit". Respondent would avoid this statement by noting (p. 12) that the court also said that "we are willing to assume that California would permit Pacific's former minority shareholders to bring the class action in their individual capacities". But that assumption was *not* on the basis that the suit was other than derivative; it was based on imagining that California would allow the former minority stockholders of Pacific to sue because they were no longer stockholders, having been forced out by respondent, and therefore could not mount a traditional derivative suit. Nevertheless, the kind of claim posited, as the court below viewed it, would be one originally belonging only to Pacific, *i.e.*, derivative.

Respondent seems to suggest a *third* kind of suit—not one by a minority shareholder asserting *his own* claim against the majority shareholder for breach of fiduciary duty owed to the minority shareholder, and not one by a shareholder asserting a claim belonging to the corporation—but something in a third world, a claim belonging to a sort of unincorporated collective of former stockholders! Even so, the issue presented by the petitioner remains unchanged. As "master of his case" petitioner chose to

sue on a theory of injury to himself and not on a claim belonging to some unincorporated collective. It is for the state court to decide whether, on the facts alleged, there is a case for injury to petitioner alone, or whether there can only be a claim for an unincorporated collective.

Petitioner asserts a claim for violation of a duty owed to him directly by the majority shareholder. To be sure, he wished to maintain a class action on behalf of all in like position. But whether *his* claim was or was not for more than $10,000 is exactly the same as if he had sued without mention of a class action.

Respondent notes that the original complaint mentions $38 million, but that was the *aggregate* of the damages of all members of the class. The allegation was that "Plaintiff *and* the class members have been damaged in the amount of at least $38,000,000" (attached Appendix A, ¶ 8). As to the amount of plaintiff's own claim the original complaint was silent. *Lindsay v. Alabama Tel. Co.*, 576 F.2d 593, 594 (5 Cir. 1978), reversing a denial of remand, is apt in stating:

> "Obviously, in pleading his suit in the state court, the plaintiff was not seeking to satisfy any jurisdictional amount requirements. The complaint, therefore, may not be expected to read as if plaintiff had filed his original suit as a federal diversity action. Nevertheless, the amounts in controversy are adverted to in plaintiff's amended complaint."

The burden of establishing federal jurisdiction is always on the party claiming that jurisdiction, *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178, 189 (1936), just as much on removal as on a suit filed originally in a federal court, *Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F.2d 252, 255 (5 Cir. 1961). Therefore, unless aggregation performed the task, respondent had the burden of showing that the claim exceeded $10,000. Its petition for removal did contain a bare conclusory sentence to that effect, but on the motion for remand plaintiff showed, by affidavit, that there were over 16 million minority shareholders whose claims made up the $38 million, each share thus damaged by $3.65, and that plaintiff had around 1400 shares; plaintiff's own claim thus was shown, before any amended complaint, as the

same $4200 stated in the amended complaint. (Copy of the Affidavit is attached as Appendix B.) That affidavit was not challenged or controverted.

If the decision below were allowed to stand on the theory of a claim belonging to an unincorporated collective, the barrier of *Snyder v. Harris* to intrusion of federal courts on state jurisdiction will have become porous.

Respondent's opposition to the first ground presented by our petition is not candid and does not alter the question.

II. Second Ground: Misuse of Pretrial Procedure

The gist of respondent's opposition to our second ground can be reduced to three statements.

(1) The first is that the district court had ordered that no further amendment of the complaint would be allowed. But no amendment of the complaint was necessary to permit recovery (Petition, pp. 9, 10). We there noted (at p. 10) that, with the pleading already on file,

> "[n]othing was needed to expand the reach of plaintiff's claim. On the contrary, to support the judgment of dismissal, something was needed to *constrict* the relief." [Emphasis in original.]

(2) Respondent's second statement is an effort to supply the constriction. It asserts that the issues had been delimited by a pretrial order. *But there was no pretrial order limiting the issue* (Petition, p. 10). Appendix D to the petition is a copy of the *only* pretrial order, respondent does not assert that there was any other, and that order need only be read to see that nowhere does it attempt to delimit any issue.

(3) The third statement is that a stipulation of facts included the sentence that "it is this $418 million refund that forms the basis of plaintiff's complaint in this case". That sentence is true because, if there had been no refund, the extra taxes caused by failure to take accelerated depreciation would have been offset by the higher telephone rates and there would have been no damages. What this true sentence does *not* say is that plaintiff

eschewed recovery of damages resulting from failure to minimize taxes.

The disposition below of the case was a throwback to the most rigid artificialities of antediluvian procedure.

Conclusion

We respectfully submit that the writ should be granted.

Dated: San Francisco, California, March 6, 1986.

MOSES LASKY*
SAMUEL L. HOLMES

Attorneys for Petitioner
Alexander F. Eagle

(Appendices follow)

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* Counsel of record

Appendix A

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Telephone: (415) 981-1050
Attorneys for Plaintiff

Superior Court of the State of California
In and For the City and County of San Francisco

No. 785006
[Class Action]

Alexander F. Eagle, individually and
on behalf of all others similarly situated,
Plaintiff,

vs.

American Telephone & Telegraph Company,
a corporation,
Defendant.

[Filed Sept. 11, 1981]

Minority Shareholder's Complaint For Damages

Plaintiff alleges:

1. Plaintiff Alexander F. Eagle is now and at all times herein mentioned was a resident of Sonoma County, California, and a shareholder owning 1400 shares of The Pacific Telephone & Telegraph Company, a corporation (hereafter Pacific).

2. Defendant American Telephone & Telegraph Company (hereafter American) is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of New York doing business in the State of California and having its principal place of business in California located in the City and County of San Francisco. Defendant is and at all times herein mentioned was dominant shareholder of Pacific Telephone, being the owner of approximately 90 percent of the issued and outstanding shares of said corporation.

3. Plaintiff brings this action on his own behalf and on behalf of all other persons similarly situated. The class which plaintiff represents is composed of the minority shareholders of Pacific, i.e., all of the shareholders of said corporation other than defendant. The persons in the class are so numerous, consisting of several hundred individuals and entities, that the joinder of all such persons is impracticable. The disposition of their claims in a class action is a benefit to the parties and to the court.

4. There is a well-defined community interest in the questions of law and fact involved herein affecting the parties to be represented in that each and all of them have suffered damage in the same manner and by reason of the same unlawful conduct, varying only in the amounts of damage suffered by each, which correspond to the number of shares each owns in Pacific, all resulting by reason of the actions and activities of defendant in controlling, managing, operating and using Pacific for defendant's advantage in violation of the rights of all minority shareholders. Proof of a common or single state of facts will establish the right of each member of the class to recover. The claims of the plaintiff are typical of those of the class and plaintiff will fairly and adequately represent the interests of the class.

5. There is no plain, speedy or adequate remedy other than by maintenance of this class action since plaintiff is informed and believes that the damage to each plaintiff is relatively small on a per share basis and many members of the class own only a few shares; thus making it economically infeasible to pursue remedies other than a class action. Consequently, there will be a failure of justice but for the maintenance of the class action.

6. American, as controlling stockholder of Pacific, elected all directors and, through the directors, elected all officers and made the policy decisions of Pacific. Among such decisions was the deliberate choice to forego and not to claim deductions against federal income taxes of amounts for accelerated depreciation and investment tax credits, which decisions and choices were made for the benefit of American, although injurious to the minority shareholders of Pacific.

7. By reason of the actions referred to in the preceding paragraph, Pacific was required by an order dated September 13, 1977, by the California Public Utilities Commission to refund to its subscribers or ratepayers the sum of $205,586,000. Said order was confirmed by a further order of the California Public Utilities Commission dated February 13, 1980, which required Pacific to refund $381,000,000 plus interest, all of which has reduced or will reduce the assets of Pacific and the amounts otherwise available to pay as dividends to shareholders or to enhance the net worth or underlying value of the shares owned by plaintiff and the class he represents.

8. By reason of the foregoing imprudent management of Pacific by defendant and the officers and directors controlled by defendant, plaintiff and the class members have been damaged in the amount of at least $38,000.000.

9. Plaintiff is informed and believes and therefore alleges that American has engaged in other activities of like nature in controlling, managing, operating and using Pacific for its own advantage and profit to the injury of plaintiff and the class, the details of which are not now known to plaintiff, and plaintiff prays leave, when the same become known, to amend this complaint in order to set forth the facts thereof and to allege the damages to plaintiff and the class resulting therefrom.

10. In the activities of defendant alleged herein, defendant has acted to injure the minority shareholders in a wanton, malicious and oppressive manner, depriving minority shareholders of their rights and their property for the purpose of its own gain. By reason thereof, plaintiff and the class are entitled to exemplary and punitive damages for the purpose of punishing defendant in the amount of $20,000,000.

11. Plaintiff has incurred, and during the pendancy of this action, will incur expenses for attorney fees and costs herein. Such attorney fees and costs are necessary for the prosecution of the action and will result in the benefit to each of the members of the class. A reasonable attorney fee is a sum equal to 20 percent of the first two million dollars of recovery, 15 percent of the next 23

million dollars of recovery and 12½ percent of the excess over 25 million dollars of recovery.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages according to proof, with interest thereon at the legal rate;

2. For exemplary and punitive damages in the sum of $20 million;

3. For the payment of plaintiff's attorney fees out of the monies recovered for the joint benefit of the members of the class;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court deems meet and just to the premises.

Dated: September 10, 1981.

ANGELL, HOLMES & LEA

By /s/ SAMUEL L. HOLMES
Samuel L. Holmes
Attorneys for Plaintiff

[Verification Omitted]

Appendix B

Samuel L. Holmes
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Attorneys for Plaintiff

United States District Court
Northern District of California

C-81-4078 SC

Alexander F. Eagle, individually and on behalf of all others similarly situated,
Plaintiff,

vs.

American Telephone & Telegraph Company, a corporation,
Defendant.

[Filed Oct. 22, 1981]

Affidavit in Support of Motion to Remand

State of California
City and County of San Francisco } ss.

Alexander F. Eagle, being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled action.

2. My wife Dolores J. Eagle, and I are owners in joint tenancy of 1400 shares of common stock of The Pacific Telephone and Telegraph Company.

3. The annual report of The Pacific Telephone and Telegraph Company for the year ended December 31, 1979, showed that American Telephone & Telegraph Company owned 152,036,157 shares of The Pacific Telephone and Telegraph Company.

4. That number represents approximately ninety percent (90%) of the shares of The Pacific Telephone and Telegraph Company, as admitted in the answer filed by American Telephone & Telegraph Company in this action.

5. The minority shareholders whom I represent in this action collectively own approximately 16 million shares.

6. The amount in controversy is slightly more than $3.65 per share.

7. Various records of the California Public Utilities Commission, as well as records of The Pacific Telephone and Telegraph Company, show that each shareholder in the group comprising more than ninety percent (90%) of the minority shareholders owns 500 shares or less. For example, Exhibit 66 (at page 4), admitted in evidence before the California Public Utilities Commission in Application No. 58223, sets forth that fact.

8. The foregoing facts show that the amount in controversy as to ninety percent (90%) of the members of the plaintiff class is not over $1,725 each. Even if plaintiffs are able to prove double the damages specifically alleged in the complaint, the amount in controversy for each of ninety percent (90%) of the plaintiffs would be only $3,450.

(9) The amount in controversy with respect to my interest in the shares standing in the names of my wife and myself is $2,550, which would be doubled by adding my wife's interest in the shares.

Further affiant saith not.

Dated: October 22, 1981, at San Francisco, California.

ALEXANDER F. EAGLE

Subscribed and sworn to before
me this 22nd day of October, 1981.

GRACE P. STONEHAM
Notary Public